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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 613

THEODORE W. BERENSON, ET AL,
Petitioners,

v.

THOMAS N. MUCHARD,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Baldwin Printing Company, Inc., 209 West 8th Street, Austin, Texas

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on September 6, 1962.

Citation to Opinions Below

The District Court delivered no written opinion. The opinion of the Court of Appeals, printed in

Appendix A, *post*, Page 7, is reported at 307 F.2d 368.

Jurisdiction

The judgment of the Court of Appeals was entered on September 6, 1962. (R. 133). Rehearing was denied on October 17, 1962. (R. 140), the jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Jurisdiction below rests on diversity.

Questions Presented

1. Whether a plaintiff may relitigate the propriety of a transfer under 28 U.S.C. §1404(a) and the doctrine of *forum non conveniens* by filing a voluntary dismissal in the transferee court after the transfer and then bringing the same action again against the same parties in the same transferor court.

2. Whether, this being a diversity case and *res judicata* being a branch of the substantive law, the Texas rule of finality of venue and like determinations rules this case.

Statutory Provision Involved

The statutory provision involved is 28 U.S.C. §1404(a):

> "(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." June 25, 1948, c. 646, 62 Stat. 937.

Statement

Respondent brought a contract action in the Texas courts which petitioner removed because of diversity to the Federal Court for the Western District of Texas. That Court transferred the action to the Southern District of New York "Under the doctrine of 'forum non conveniens' and in the interest of justice." (R. 27, 29). The transfer took place in response to proper motions by petitioners, after a hearing and the filing of briefs in the District Court (R. 7), and after review by mandamus had been unsuccessfully sought by respondent in the Court of Appeals for the Fifth Circuit (No. 18,383; R.31).

At the time the transfer was ordered it was settled law in that Circuit, as well as in several others, that such transfers could be ordered under 28 U.S.C. §1404(a), to any District in which the suit could originally have been brought free of any waiver. Ex parte *Blaski*, 245 F.2d 737 (5th Cir. 1959). The Seventh Circuit, however, had disagreed, refusing to accept the transfer of the *Blaski* case, and the resulting conflict was pending before this Court when the Court of Appeals refused to file respondent's petition for mandamus. However, respondent did not seek review in this Court of the transfer order here involved.

Instead, after the transfer, and after the case had been docketed in the Southern District of New York, respondent filed a voluntary dismissal there (R. 34), prompted, he states, by the intervening

decisions of this Court in *Hoffman v. Blaski*, 363 U.S. 335 and *Sullivan v. Behimer*, 363 U.S. 335, adopting the Seventh Circuit's more restrictive view of the transfer statute. Respondent did not move in the Southern District of New York for a re-transfer of the case (as had been done in *Blaski* and in *Sullivan)* nor, of course, did he seek relief in the Second Circuit, or in this Court through the appellate hierarchy over the transferee court.

Having so dismissed in New York, respondent filed again in the state court in Travis County, Texas (R. 3-6). Petitioners removed the case again (R. 1), and moved to dismiss on the ground of *res judicata* (R. 7-8). The District Court granted the motion (R. 119-20). The Court below reversed the order of the District Court and ordered remand for further proceedings (R. 128, 133).

Reasons for Granting the Writ

1. The decision of the Court below incorrectly determines an important question of proper Federal forum not presented in this Court's *Blaski* and *Sullivan* decisions. Under the rule here announced, a decision of proper forum for trial under 28 U.S.C. §1404(a) and general principles of *forum non conveniens*, although permitted to become final, does not conclude these issues. Rather they remain open for relitigation by the new device of a dismissal in the transferee court and a refiling in the Court which has already once determined them, a procedure entirely foreign to that followed in *Blaski* and *Sullivan*. Correct or incorrect, the decision of

forum may be relitigated so often as limitations, further research or new evidence, and persistence of counsel permit or indicate. The procedure so established will promote disorder in the disposition of such matters in the Federal Court system, and the decision sanctioning it is in conflict with settled general principles (Restatement of Judgments §49, and Comment b thereto) and with this Court's rule of decision in such matters. See *Angel v. Bullington*, 330 U.S. 183, 91 L.Ed. 832 (1947).

2. This is a diversity case in which the Court below has ignored the Texas law of finality of decisions, a branch of the substantive law, turning to rules of another state jurisdiction on the subject. Res judicata is a branch of the substantive law; under Texas law the former decision of proper forum is final and may not be relitigated, whether correct or incorrect, and is fixed rather than avoided by such a dismissal as was here taken; but the Court below has applied the apparently contrary Wisconsin law as its rule of decision. See *State Farm Ins. Co. v. Duel*, 324 U.S. 154 (1945), a Wisconsin diversity case cited by the Court below as its authority, and *contra*, the Texas decisions in *Tempelmeyer v. Blackburn*, 141 Tex. 600, 175 S.W.2d 222; *Richardson v. Kelly*, 179 S.W.2d 991, affirmed, 144 Tex. 497, 191 S.W.2d 857, cert denied, 329 U.S. 798; *Rogers v. Waters*, 267 S.W.2d 582 (Tex.Civ.App. 1954). See also 1 MacDonald, *Texas Civil Practice* §463, and *Arnold v. City of Sherman*, 244 S.W.2d 880 (Tex.Civ.App. 1951, error ref'd) (on changes in the law intervening between decisions in the same

cause) and *Roach v. Trinity Universal Ins. Co.*, 119 S.W.2d 127 (Tex.Civ.App. 1938) (on forum of trial as a substantial right). The decision below not only presents manifest error on this head therefore, but since the Texas law is so clear the decision throws in doubt what rule of decision on res judicata is to be applied in diversity cases.

Conclusion

For the foregoing reasons, the Petition for writ of certiorari should be granted.

Respectfully submitted,

THOMAS GIBBS GEE
ROBERT J. HEARON, JR.
Counsel for Petitioners
Capital National Bank Building
Austin, Texas

CERTIFICATE OF SERVICE

I, Thomas Gibbs Gee, certify that I am a member of the Bar of the Supreme Court of the United States and one of the attorneys of record for petitioner herein. I do further certify that copies of the foregoing petition for writ of certiorari have been forwarded by United States mail, postage prepaid, to the following named attorney of record for respondent: James K. Meyers, Esquire, c/o Messrs. Gay & Meyers, Capital National Bank Building, Austin, Texas.

Thomas Gibbs Gee

APPENDIX A

Opinions and Orders Below

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19318

THOMAS N. MUCHARD

Appellant.

versus

THEODORE W. BERENSON, ET AL.,

Appellees.

Appeal from the United States District Court for the Western District of Texas.

(September 6, 1962)

Before HUTCHESON, RIVES and BELL, Circuit Judges

RIVES, Circuit Judge: The district court sustained the defendants' motion to dismiss this action on the ground of resjudicata and, as to some of the defendants, on the further ground that the court lacked jurisdiction of the person.

The action was to recover compensation for services pursuant to a written contract of employment. A prior action on the same claim had been trans-

ferred by the district court to the United States District Court for the Southern District of New York. The plaintiff was a resident of the Western District of Texas. The defendant Berenson resided in Massachusetts; Berg, Dimson and Henkind resided in New York; and Houston Building Corporation was incorporated under the law of Delaware and had its principal place of business in New York. The action could therefore be properly brought in the Western District of Texas but not in the Southern District of New York.[1]

When the motion to transfer the prior case to the Southern District of New York was granted, such a transfer was apparently permissible under this Court's decision in *Ex parte Blaski*, 5 Cir., 1957, 245 F. 2d 737. By the time the papers actually reached the Southern District of New York, our decision in *Ex parte Blaski, supra*, had been disapproved by the Supreme Court in *Hoffman v. Blaski*, 1960, 363 U.S. 335. That decision settled the principle that under 28 U.S.C.A. §1404(a) the transferee district must be one in which the action "might have been brought" by the plaintiff as a matter of right, independently of the wishes of the defendant. Under that decision the prior action on this claim was not properly transferred to the

[1] "(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside." 28 U.S.C.A. § 1391(a).

Southern District of New York. No defendant had answered in that action, and the plaintiff then filed a notice of dismissal without prejudice pursuant to Rule 41(a), Federal Rules of Civil Procedure.

Plaintiff then filed the present action on the same claim in the Texas State Court and the defendants had the case removed to the federal court. Subsequently, the defendants moved to dismiss the action because the question had become res judicata that this same alleged claim should be transferred to the United States District Court for the Southern District of New York. The district court granted that motion.

That the district court erred seems clear for either of two reasons: First, the order of transfer was not a final judgment, and the rules of res judicata apply only to final judgments;[2] second, "res judicata is no defense where between the time of the first judgment and the second there has been an intervening decision or a change in the law creating an altered situation." *State Farm Ins. Co. v. Duel*, 1945, 324 U.S. 154, 162; see also 30 Am. Jur. Judgments, §335; 50 C.J.S. Judgments, §650, p. 95.

The contract of employment forming the basis of the action was alleged to have been made in 1953 and modified in 1954. Three of the individual defendants, Berg, Dimson and Henkind, were served

[2] A.L.I Restatement of Judgments, § 41; 30A Am. Jur. Judgments, § 340; 50 C.J.S. Judgments, § 320.

with process by service on the Secretary of State of Texas pursuant to Article 2031b Texas Civil Statutes which became effective on August 10, 1959. Judge Ingraham in *Lone Star Motor Import, Inc. v. Citroen Cars Corp.*, S. D. Tex., 1960, 185 F. Supp. 48, 51, held that Article 2031b was remedial and should be given a retroactive effect. That part of Judge Ingraham's decision was upheld by this Court on appeal. *Lone Star Motor Import, Inc. v. Citroen Cars Corp.*, 5 Cir., 1961, 288 F. 2d 69, 72. Judge Garza has, however, had strong convictions that Article 2031b does not apply retroactively to a claim arising prior to the enactment and effective date of the statute. *Rozell v. Kaye*, S. D. Texas, 1961, 197 F. Supp. 733; second opinion 1962, 201 F. Supp. 377. Judge Garza concluded his second opinion as follows:

> ". . . under the authority granted to this Court under 28 U.S.C.A. § 1292(b), will state that since my action involves a controlling question of law as to which there is substantial ground for difference of opinion, and that I believe that an immediate appeal from the order may materially advance the ultimate determination of the litigation, so that the Plaintiff may ask the Court of Appeals in its discretion to permit an appeal to be taken from such order."

201 F. Supp. at p. 379. We find, however, that the plaintiff did not make application to this Court for permission to take such an interlocutory appeal. The Dallas Court of Civil Appeals of Texas, while

not definitely so holding, has indicated a view that the Article does apply retroactively. *McCarty v. Hinman*, 1960, 324 S. W. 2d 29, 32 (no writ history). In the absence of some authoritative decision of the Supreme Court of Texas on the question, we adhere to the ruling in *Lone Star Motor Import, Inc. v. Citroen Cars Corp., supra*, and hold that the substiture service on the three defendants was authorized.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit

(SEAL)

By Clara R. James, Deputy

New Orleans, Louisiana Oct. 26, 1962

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1961

No. 19,318

D. C. Docket No. 1164 Civil

THOMAS N. MUCHARD,

Appellant,

versus

THEODORE W. BERENSON, ET AL.,

Appellees.

Appeal from the United States Court for the Western District of Texas.

Before Hutcheson, Rives and Bell, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was taken under submission by the Court upon the record and briefs on file;

ON CONSIDERATION WHEREOF, It is now

here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellees, Theodore W. Berenson, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

September 6, 1962

Issued:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19318

THOMAS N. MUCHARD,
Appellant,

versus

THEODORE W. BERENSON, ET AL.,
Appellees.

Appeal from the United States District Court for the Western District of Texas.

(OCTOBER 17 1962)

ON PETITION FOR REHEARING

Before HUTCHESON, RIVES and BELL, Circuit Judges.

PER CURIAM:

The petition for rehearing in the above-styled and numbered cause is hereby

DENIED.

Petition for Rehearing Filed 9/27/62
Petition for Rehearing Denied 10/17/62

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19318

THOMAS N. MUCHARD

Appellant,

versus

THEODORE W. BERENSON, ET AL.

Appellee.

ON CONSIDERATION OF THE APPLICATION of the Appellees in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellees to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of

the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

DONE AT NEW ORLEANS, LA., this 26th day of October, 1962.

/s/ RICHARD T. RIVES,
United States Circuit Judge.

(Original Filed October 26, 1962)

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IN THE

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OCTOBER TERM, 1962

No. 613

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH DISTRICT

BRIEF FOR RESPONDENT IN OPPOSITION

COLEMAN GAY
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LIST OF AUTHORITIES

Cases

	Pages
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH DISTRICT

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals is reported at 307 F. 2d 368. There was no written opinion of the District Court.

Jurisdiction

The petition adequately sets forth the jurisdictional requisites.

Question Presented

Whether, where a cause has been improperly transferred to a District in which it could not have been brought, a plaintiff may in accordance with Rule 41 (a), Federal Rules of Civil Procedure, dismiss without prejudice and re-file in the District having venue of the cause.

Statute Involved

The petition sets forth the statute involved on page 2.

Statement

Respondent's prior contract suit against petitioners was removed to the United States District Court for the Western District of Texas and upon petitioners' motion was transferred to the United States District Court for the Southern District of New York pursuant to 28 U.S.C. Sec. 1404a. (R. 7, 8, 28). Respondent opposed the transfer and applied for a writ of mandamus or prohibition to the United States Court of Appeals for the Fifth Circuit which was not granted. (R. 31). Subsequent to transfer this Court announced its decision in *Hoffman v. Blaski*, 363 U.S. 335, and *Sullivan v. Behimer*, 363 U.S. 335. Respondent then dismissed without prejudice the action then pending in the Southern District of New York and re-filed the case in State Court in Texas. Petitioners again removed and, based upon a plea of *res judicata*, obtained a dismissal on the ground that the order transferring the prior case to New

York barred prosecution of the subsequent case in Texas.

Argument

I.

The Present Case Does Not Merit Review By This Court

Right or wrong (and respondent can demonstrate that it is clearly right), the decision below is on a narrow point that will not again arise and as to which petitioners' position here is unbelievably technical. Apparently conceding that respondent could have obtained a re-transfer of the former case by appropriate motion, petitioners contend that he could not accomplish exactly the same end by a voluntary dismissal and a re-filing of the case in Texas. The transfer of the former case was clearly beyond the power of the District Court under the decision of this Court in *Hoffman v. Blaski* and *Sullivan v. Behimer, supra.* Since petitioners had filed no answer in the former case respondent voluntarily dismissed it without prejudice pursuant to Rule 41 (a), Federal Rules of Civil Procedure. Presumably District Courts will in the future adhere to the rule established in the *Blaski* and *Sullivan* decisions and will not transfer cases to districts in which they could not have been brought originally. Thus it is unlikely that it will again be necessary for a plaintiff to decide whether he should move the transferee Court to re-transfer or dismiss and re-file in order to return the cause to its proper forum. The decision

below settles a question involving the mechanics of a re-transfer of a cause erroneously transferred to an improper forum. Such is not likely to happen again in view of the holdings in *Blaski* and *Sullivan* and this Court's decision of the same question might satisfy petitioners' curiosity but is not likely to answer any problems, if such exist, unanswered in *Blaski* and *Sullivan*.

II.

The Decision Below Is Clearly Correct

Petitioners contend that the transfer in the former case is *res judicata* of something but of just what they do not say. At most the transfer determines that it is more convenient for this cause to be heard in New York than in Texas. It does not determine that the cause can not be heard in Texas. The New York Court is unavailable to respondent since not all of petitioners are subject to process there and since that Court does not have venue of the cause. Thus, if petitioners should prevail in their contention, respondent would be denied his day in court, although his voluntary dismissal was without prejudice and in strict compliance with Rule 41(a), Federal Rules of Civil Procedure.

Petitioners contend that Federal Courts in construing and applying the applicable Federal Statute, 28 U.S.C., Sec. 1404(a), in a diversity case, should be controlled by State Court decisions construing and applying a materially different State Statute, Art. 1995, Vernon's Texas Statutes. Such

a rule would not tend to create uniformity in the construction and application of the Federal Statute, to say the least. Even if the Federal Statute were identical to the State Statute, surely the Federal Court would be free, even in a diversity case, to determine as a matter of Federal law whether the former transfer barred a re-filing of the case in the same court. However, there is indeed a material difference in the statutes. The Federal Statute presupposes two courts each with the power to hear the cause, one of which is a more convenient court. The Federal Courts are given a power to transfer that is discretionary.

Article 1995, Vernon's Texas Statutes, permits no discretion. If no exception set forth in the article is applicable and the article is properly invoked the Texas Court must transfer the case to the County in which the defendant resides. Rule 89, Texas Rules of Civil Procedure. If the defendant's plea of privilege to be sued in the County of his residence is not controverted the Texas Court is powerless to do anything but transfer the case. *Bogle v. Landa*, 127 Tex. 317, 94 S.W.2d 154 (1936). In Texas the issue determined on a plea of privilege is whether the Court in which the suit is pending has the power to hear the cause. Under the Federal Statutes the issue is in which of two Courts is it more convenient to hear the cause. The decision in the former case may have determined that it was more convenient to hear the cause in New York, but the Courts there are, under the decision of *Blaski* and *Sullivan*, unavailable to respondent. That the Federal Court in

Texas is less than convenient surely would not justify a dismissal of respondent's case with the consequence that it can not be heard in any Court.

Conclusion

For the reasons stated respondent respectfully submits that the petition for a writ of certiorari should be denied.

Coleman Gay
James R. Meyers
Capital National Bank Building
Austin 1, Texas

Counsel for Respondent

I, Coleman Gay, certify that I am a member of the Bar of the Supreme Court of the United States, and one of the attorneys of record for respondent. I further certify that copies of the foregoing Brief of Respondent in Opposition to Petition for Certiorari were delivered to Messrs. Thomas Gibbs Gee and Robert J. Hearon, c/o Messrs. Graves, Dougherty, Gee and Hearon, Capital National Bank Building, Austin, Texas.